United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4213

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4213

SOCIALIST WORKERS PARTY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF FOR INTERVENOR CBS INC.

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the District of Columbia Circuit in Chisholm v. FCC, No. 75-1951 (D.C. Cir., April 12, 1976), petitions for certiorari pending, Nos. 76-101, 76-205, is correct, and this Court should therefore affirm the

determination of the Federal Communications Commission that the 1976 presidential and vice-presidential debates sponsored by the League of Women Voters are exempt from the "equal opportunities" requirements of Section 315(a) of the Communications Act of 1934, 47 U.S.C. § 315(a).

REFERENCE TO RULING

The ruling of the Federal Communications Commission under review in this case is an order issued September 20, 1976 and released September 22, 1976 (FCC 76-875) declining to review a decision of the FCC's Broadcast Bureau earlier that day denying a request of the Socialist Workers Party for "equal opportunities" with respect to the 1976 presidential and vice-presidential debates.

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

INTRODUCTION

This case involves a petition for review of a Federal Communications Commission ("FCC") order concerning the application of the "equal opportunities" provisions of Section 315(a) of the Communications Act of 1934, 47 U.S.C. § 315(a), to certain debates between candidates for political office.*/ The order denied a request of the Socialist

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*/ On September 23, 1976, CBS Inc. filed a Motion for Leave to Intervene in this proceeding. On September 24, 1976, the FCC made a motion to transfer this case to the District of Columbia Circuit. For the reasons set forth in the FCC's memorandum in support of that motion, we urge that that motion be granted.

Workers Party ("SWP") for "equal opportunities" because of the broadcast of the then-forthcoming presidential debate. As a practical matter, however, SWP has instituted this proceeding to obtain review by this Court of that part of the FCC's declaratory ruling in Aspen Institute, 55 F.C.C.2d 697 (1975), that broadcast of debates between political candidates under the auspices of independent nonbroadcaster entities constitutes "on-the-spot coverage of bona fide news events" exempt from "equal opportunities" requirements. In Chisholm v. FCC, No. 75-1951 (D.C. Cir. April 12, 1976), petitions for certiorari pending, Nos. 76-101, 76-205, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's Aspen ruling. For the reasons set forth below we urge this Court to follow Chisholm and to affirm.

STATEMENT OF THE CASE

Background

Section 315 of the Communications Act, 47 U.S.C. § 315, provides generally that use of broadcast facilities by one candidate for political office entitles all other such candidates to "equal opportunities" to use those facilities. Section 315, however, exempts certain categories of

broadcasts including "on-the-spot coverage of bona fide news events." Prior to 1975 the rulings of the FCC effectively precluded broadcasts of presidential debates. FCC decisions had held that broadcasts of debates were not exempt as "on-the-spot coverage of bona fide news events." National Broadcasting Company (Wyckoff), 40 F.C.C. 370 (1962); The Goodwill Station (WJR), 40 F.C.C. 362 (1962). Given the number of candidates routinely entering presidential campaigns and the resulting equal time obligations that would arise with respect to numerous candidates, the broadcast of debates in presidential campaigns was not feasible between 1961 and 1976.*/

In April 1975 the Aspen Institute Program on Communication and Society ("Aspen") petitioned the Commission to reexamine Goodwill and Wyckoff. Aspen argued that those rulings had been based on an erroneous interpretation of the legislative history of the 1959 amendments to the Communications Act, and the Commission, in its September 1975 decision, agreed, overruling Goodwill and Wyckoff. Aspen Institute, supra. Several parties sought review of the Aspen decision in the District

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*/ For example, in 1972 there were at least eleven candidates for President; in 1968 there were at least fourteen. Chisholm v. FCC, supra, Slip op. at 9 n. 7.

of Columbia Circuit, and on April 12, 1976 that court upheld the Commission. Chisholm v. FCC, supra. Petitions for rehearing and rehearing en banc were denied May 13, 1976.

In the same month, the League of Women Voters ("League") announced that it intended to sponsor debates between presidential candidates.*/ The possibility of the debates was thereafter repeatedly discussed in the press.**/ President Ford, in his August 18 speech accepting the presidential nomination of the Republican Party, challenged Jimmy Carter, the Democratic nominee, to debates and Mr. Carter accepted on August 19. On the day of Mr. Carter's acceptance, the League announced that it had invited President Ford and Mr. Carter to participate in three League-sponsored debates.***/

SWP's Request to the FCC for Equal Opportunities and the FCC's Order

On September 7, 1976 SWP sent a short one-paragraph telegram to the FCC asking for "equal time" with respect to the 1976 presidential and vice-presidential debates. SWP offered no factual or legal arguments in support of its request. It demanded, without more, an "order requiring ABC,

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*/ New York Times, p. 42, May 6, 1976; Sec, p. 24, May 7, 1976.

**/ See, e.g., New York Times, p. 12, August 9, 1976; p. 17, August 12, 1976.

***/ New York Times, p. 13, August 20, 1976.

NBC and CBS television and radio networks to provide petitioners with air time equal to that to be provided to the candidates of the Democratic and Republican Parties in the forthcoming debates."*/

SWP is only one of many minor political parties**/ which routinely field presidential candidates. For example, a report dated August 19, 1976 on file at the Federal Election Commission lists some 89 candidates for the presidency this year, not including those identified as Democrats or Republicans. Among these are Averill Charles Norton of the American Peoples Freedom Party, Ivar Blomberg of the Commandments Party, Ernest L. Miller of the Restoration Party, Paul Willard Engvalson of the Holy Spirit Party, Ron Luther of the 1976 Tuition Cut Ticket, Conrad Flourney Morrow of the Symbiotic Union, and the perennial Lar Daly. A listing of candidates appears in Appendix A to this brief, which is an excerpt from Broadcasting Magazine for September 13, 1976, p. 27.

On September 20 the FCC's Broadcast Bureau issued an order denying SWP's request for "equal time." The Broadcast Bureau pointed to the holding of the Aspen Institute decision that:

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*/ SWP brief, Appendix at A-8.

**/ In the 1972 presidential election, the candidate of SWP received 97,256 votes, or about 0.12 percent of the total votes cast nationwide. The World Almanac Book of Facts 1976 322 (Newspaper Enterprises Ass'n 1975).

> "where a debate between two candidates is arranged by an independent party not associated with any candidate or broadcaster and is broadcast live and in its entirety, the broadcast of such debates is 'on-the-spot coverage of a bona fide news event' within the meaning of the exemption contained in Section 315(a)(4), and would thus not be subject to equal opportunities."

Noting that SWP had "not provided any specific information to show that the proposed debates currently being organized by the League of Women Voters do not satisfy the requirements" in Aspen, the Bureau found that "no Commission action is warranted in your complaint." The Commission itself denied SWP's oral application for review the same day, and SWP has sought review in this Court.

Related Cases

In recent weeks the District of Columbia Circuit has considered two other cases involving these particular presidential debates, the question of the exemptions under Section 315, and the right of candidates to participate in the debates: McCarthy v. Carter, No. 76-1865, and Office of Communication of the United Church of Christ v. FCC, No. 76-1878. In McCarthy, appellants seek review of a district court order denying their request, based primarily on the equal opportunities provision, that the debates be enjoined if McCarthy is excluded from them. In United Church of Christ, petitioner seeks review of a Commission

ruling that the debates may be rebroadcast -- i.e. given other than live coverage -- within 24 hours of their occurrence or later if, in the good faith judgment of the broadcaster, they are currently newsworthy. While preliminary injunctive relief has been denied in both cases, the cases are still pending. */

ARGUMENT

I. This Court Should Follow the Carefully Considered Decision of the District of Columbia Circuit in Chisholm v. FCC Holding That Candidate Debates, Such As the 1976 Presidential and Vice-Presidential Debates, Are Exempt from the "Equal Opportunities" Requirement of Section 315 of the Communications Act.

By SWP's own apparent admission (SWP brief at 10), this case constitutes nothing more than an attempt by SWP to relitigate the issue decided in Chisholm. The FCC ruling at issue in that case was rendered almost a year ago. The issue was then exhaustively briefed and was argued on November 26, 1975 before the District of Columbia Circuit. On April 2, 1976, the Court affirmed the FCC's interpretation of the statute, and on May 13, 1976 denied rehearing en banc. And that same issue is raised in pending petitions for certiorari seeking review of the Chisholm decision in the Supreme Court. Nos. 76-101, 76-205.

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*/ In addition the FCC has rejected equal time complaints by the American Independent Party and its candidate, Lester Maddox, and currently has pending equal time complaints by Eugene McCarthy and American Party candidate Tom Anderson. All of these candidates sought "equal opportunities" with respect to the presidential debates. It seems likely that additional candidates would have sought "equal opportunities" had it not been for the Chisholm decision.

SWP, despite ample opportunities to do so, elected not to participate in any way in the proceedings that led to the FCC's Aspen decision, the District of Columbia Circuit's Chisholm decision and the pending petitions for certiorari. Yet, SWP now asks this Court to reconsider on an expedited basis the very issue so carefully reviewed and resolved by the District of Columbia Circuit in Chisholm, and to reach the opposite result. The arguments SWP raises, based on the legislative history of the 1959 amendments to Section 315, are the very ones argued in detail and explicitly rejected in Chisholm.*/ Indeed, the only judicial authority cited by SWP in its brief is the opinion of the dissenting Judge in that case. See SWP brief at 10.

Even if this Court deems it appropriate, given these circumstances, to review de novo the correctness of the FCC's interpretation of Section 315 in Aspen, we submit that the Chisholm decision was clearly correct and this Court should therefore affirm the FCC order below.

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*/ SWP made no effort before the FCC to show that the 1976 presidential and vice-presidential debates do not fall within the standards enunciated in the FCC's Aspen ruling. It makes no such argument in this Court, although SWP's brief does contain scattered factual references to alleged facts concerning the current presidential debates. E.g., SWP brief at 5, 35. These alleged facts, however, were not presented to the FCC, and accordingly are not properly before this Court. See Section 405 of the Communications Act, 47 U.S.C. § 405.

A. The FCC's Rulings Here and in Aspen Give Effect to the Plain Language of the Statute and Are Fully Supported by the Legislative History.

It should be emphasized at the outset that SWP's construction of Section 315(a)(4) is flatly contradicted by the plain language of that section, exempting "on-the-spot coverage of bona fide news events." As the Commission recognized in Aspen, */ it is indisputable that some candidate debates are generally considered newsworthy and therefore within the commonly-accepted meaning of the term "news event." Indeed, it is difficult to imagine an event more newsworthy than last week's debate between President Ford and Mr. Carter, which not only was viewed by 100 million Americans but dominated the front page of the nation's newspapers for days. See, e.g., New York Times, p. 1, Sept. 23, Sept. 24, Sept. 25, 1976; Washington Post, p. 1, Sept. 23, Sept. 24, Sept. 25, 1976.

In this context SWP bears a heavy burden in arguing that Congress intended, notwithstanding the language of the statute, to exclude debates from the Section 315(a)(4) exemption. That burden is particularly great in light of the well-established principle that the interpretation of a statute by the expert agency charged with its administration is entitled to great weight. E.g., Udall v. Tallman, 380 U.S. 1,

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*/ 55 F.C.C.2d at 703-708.

16 (1965). Indeed, as the District of Columbia Circuit pointed out in Chisholm, this normal deference to agency interpretation is specifically reinforced in this instance by Congress' delegation of special authority to interpret the provisions of Section 315. Slip op. at 16-17. SWP has not met the burden of establishing that the FCC's interpretation at issue here is incorrect.

In its focus on the minutiae of the discussion at the hearings and on the floor of the Lar Daly decision*/ and the early versions of the 1959 amendments, SWP has lost sight of the basic purpose of the amendments. The thrust of the 1959 amendments was to move away from mechanistic rules, to encourage coverage of news and news events

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*/ Columbia Broadcasting System, Inc., 18 Pike & Fischer, R.R. 238, recon. denied, 26 F.C.C. 715, 18 Pike & Fischer, R.R. 701 (1959). Reversing its previous interpretation of Section 315, the Commission had ruled in Lar Daly that news coverage of an incumbent mayor entitled mayoralty candidates to equal time. It is clear that Lar Daly triggered the Congressional reaction that produced the 1959 amendments. But as the language and legislative history of the amendments indicate, their purpose was far broader than a simple overruling of that decision.

Moreover, the Lar Daly decision involved not only ceremonial appearances involving the greeting of dignitaries as suggested by SWP (Brief at 13 n. 9) but also the broadcast of candidates' statements concerning the acceptance of their candidacies and the filing of political petitions. 26 F.C.C. at 717-719. Even under SWP's theory the Congressional purpose was to render all these appearances exempt. It is difficult to understand how Congress could wish to exempt broadcast of an airport greeting ceremony or a candidate acceptance speech while at the same time making an irrevocable judgment that candidate debates should under all circumstances be rendered non-exempt.

surrounding political campaigns, and to restore to broadcasters greater journalistic discretion.

Chairman Harris of the House Committee on Interstate and Foreign Commerce opened the hearings on the proposed 1959 amendments by observing that the concept of absolute equality among candidates must give way in part to two other "worthy and desirable" objectives:

> "First, the right of the public to be informed through broadcasts of the political events; and Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events."*/

Congress chose to accomplish this goal by establishing a body of exemptions "which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of the broadcasters and networks."**/ Thus, the 1959 amendment reflects a Congressional decision to rely on the journalistic commitment of the broadcast press to ensure full, fair news coverage of political candidates.***/

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*/ Hearings on Political Broadcasts -- Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 2 (1959) (comment of Chairman Harris), quoted in Chisholm, Slip op. at 6.

**/ 105 Cong. Rec. 17782 (1959) (remarks of Chairman Harris), quoted in Chisholm, Slip op. at 23.

***/ The Senate Report expressly stated that the Committee members had "faith in the maturity of our broadcasters and their recognition to serve the public interest." S. Rep. No. 562, 86th Cong., 1st Sess. 14 (1959). See also 105 Cong. Rec. 3171 (1959) (remarks of Representative Cunningham); id. at 5405 (remarks of Senator Allott).

As Senator Case stated:

> "An informed electorate is essential in democracy. Feeding the news to the public by a measuring spoon or regulating its quantity by a stopwatch is hardly the way to accomplish this desired objective. Rather, reporting of the news should be left to the discretion of the news media." */

In short, in the words of Senator Holland quoted in Chisholm, the basic purpose of the 1959 amendments was:

> "to enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree." **/

Thus, the Chisholm court correctly rejected the notion that the 1959 amendments should be construed narrowly and concluded that:

> "the purpose of the 1959 amendment was broadly remedial, and evidenced a willingness by Congress to take some risks with the equal time philosophy in order to permit broadcast coverage of on-the-spot news and to enable broadcasters more fully to cover the political news. . . . At the same time, . . . Congress was determined to increase broadcaster discretion and

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*/ 105 Cong. Rec. 8746 (1959).

**/ Slip op. at 15, quoting 105 Cong. Rec. 14451 (1959).

allow increased live broadcast coverage of political news." Slip op. at 18-19.*/

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*/ In furtherance of this remedial purpose, the Conference Committee eliminated general language which would have limited the exemptions to situations where candidate appearances were "incidental to the presentation of news." H.R. Rep. No. 1069, 86th Cong., 1st Sess. 4 (1959) ("H.R. Rep. No. 1069"). The SWP brief suggests, however, (pp. 36-39) that the purpose of elimination of the "incidental to" language was not to give greater discretion to broadcast licensees, and that the FCC's contrary conclusion is inconsistent with the legislative history. SWP argues that the "Commission completely distorted the reason and the effect of the Conference Committee's elimination of the 'incidental to' language." Brief at 36. But it is SWP's interpretation -- not the FCC's -- which is a distortion of the legislative history. SWP's argument is based in large part on references to Rep. Bennett's opposition to the "incidental to" language. SWP suggests that Rep. Bennett successfully opposed the "incidental to" language because he wished the legislation to be more restrictive of broadcaster discretion.

It is true that [illegible] Rep. Bennett opposed particular legislative [illegible] too broad, but the "incidental to" [illegible] subject of his objections at that [illegible] Equal Time Before the Communications [illegible] Comm. on Interstate and Foreign [illegible], 1st Sess. 80 82 (1959). Rep. Bennett [illegible] the House bill. 105 Cong. Rec. 16241 [illegible] the floor of the House he opposed the "[illegible]" language because he felt it would interfere with [illegible] remedial purpose of the legislation. For example, he stated his fear that if such language were included:

> "stations and networks may decide that they cannot risk permitting the appearance of candidates under these circumstances, and then we shall have accomplished nothing by amending the statute because, just the same as now under the Lar Daly decision, stations will feel compelled to keep candidates out of newscasts and out of on-the-spot coverage of news events or risk complaints and appeals to the Commission."

105 Cong. Rec. 16241 (1959). Not surprisingly this language is not quoted in the SWP brief. The comments of Rep. Bennett clearly support the view that the general language of the exemptions was designed to confer broad journalistic discretion.

Nonetheless, SWP advances in support of its construction of Section 315(a)(4) several arguments based on selected portions of the voluminous legislative history.

First, SWP contends that the Commission should have found candidate debates ineligible for exemption as "news events" because Congress considered but rejected several bills that would have provided specific exemptions for debates.*/ The legislative history shows, however, that the deletion of these debate provisions signified not a decision that debates could not be exempt, but a determination that it was pointless to try to catalogue all possible exempt formats. Early drafts of the 1959 statute attempted to list exhaustively the various types of formats exempt from Section 315;**/ the final version, on the other hand, exempted four general categories of news coverage. This did not represent a determination that debates would not qualify for exemption under one of these four broad categories. As Chairman Harris of the House Committee on Interstate and Foreign Commerce stated:

> "On the other hand, and I want you to get this, . . . the elimination of these categories by the committee was not intended to exclude any of these programs if they can

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*/ SWP brief at 17-30.

**/ E.g., S. 1858, 86th Cong., 1st Sess. (1959).

> be properly considered to be newscasts or on-the-spot coverage of news events."*/

Second, SWP argues that debates are not exempt because the candidates participating in the debate do so in order to serve their own political ends.**/ SWP places great reliance upon a passage in the Conference Report stating:

> "In the conference substitute, in referring to on-the-spot coverage of news events, the expression 'bona fide news events' instead of 'news events' is used to emphasize the intention to limit the exemptions from the equal time requirement to cases where the appearance of a candidate is not designed to serve the political advantage of that candidate." H.R. Rep. No. 1069, supra at 4. (Emphasis added.)

SWP assumes that the language in the Report refers to appearances designed by the candidate to serve his political advantage.***/ The legislative history and ordinary common sense militate against this inference, however. As the Commission found in Aspen,****/ the only reasonable interpretation is that Congress merely meant to withhold exemption from the equal opportunities requirement in cases where the appearance of the candidate was designed by the broadcaster

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*/ 105 Cong. Rec. 16229 (1959), quoted in Chisholm, Slip op. at 16-17 n. 17. See also id. at 17782 (1959) (remarks of Rep. Harris).

**/ SWP brief at 33-40.

***/ Id. at 37-39.

****/ 55 F.C.C.2d at 704-05 n. 10.

to serve the political advantage of the candidate.

The "political advantage" language quoted above merely echoed more specific language, which appeared just two paragraphs earlier in the Conference Report, defining "bona fide" according to the intent of the broadcaster. Referring to the m[illegible]ning of "bona fide" in the context of news interviews, the Report stated that:

> ". . . the determination [of interview content, format, and participants] must have [illegible] or network, as the [illegible] exercise of its 'bona fide [illegible] for the [illegible] for [illegible], supra at [illegible]

[illegible] that Congress [illegible] opportunities rule [illegible] intended his [illegible] would effectively [illegible] of candidate appearan[illegible] "Congress recognized that the [illegible] at any event would, objectively, [illegible] interest." */ As experienced candidates themselves, the legislators were undoubtedly aware that a candidate strives to gain some political

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*/ 55 F.C.C.2d at 704-05 n. 10.

advantage virtually every time he appears in public,*/ whether it is at a debate or a ribbon-cutting.

Interpreting the "on-the-spot coverage of bona fide news event" exemption on the basis of the candidate's motive for appearing would also be inconsistent with other provisions of Section 315(a). For example, a candidate's participation in a news interview or his delivery of an acceptance speech at a political convention inevitably is designed to advance his campaign for office, yet Congress provided express exemptions for both such situations.**/

Third, SWP maintains that broadcast of a debate cannot constitute "on-the-spot coverage of bona fide news events" under Section 315(a)(4) because it is "under the control of the candidate."***/ This contention, too, is without merit. Congress did consider several bills which would have exempted news coverage from the equal opportunities

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*/ ". . . [A]s a candidate myself in those days I was anxious to put out such publicity as would get into the news on the radio, but it was never considered to be use of the radio as intended by the [equal opportunities] law." Hearings on Equal Time Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess 113 (1959) (testimony of former Sen. C. C. Dill), quoted in S. Rep. No. 562, supra at 6.

**/ 47 U.S.C. §§ 315(a)(2) ("bona fide newscast"), (a)(4) ("on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)") (1970).

***/ SWP brief at 33-40.

requirement only if the program format and content were controlled by the broadcaster.*/ At the urging of the FCC, however, this proposal was dropped in favor of the "bona fide" test.**/ The Conference Report specifies that the broadcaster must determine format, content and participants only in the case of news interviews exempted under Section 315(a)(2). H.R. Rep. No. 1069, supra at 4. Indeed, the 1959 amendments expressly exempt certain events that are entirely within the control of the candidate, such as acceptance speeches at political conventions.***/

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*/ See S. 1585, S. 1604, S. 1858, and S. 1929, 86th Cong., 1st Sess. (1959); H.R. 5389, H.R. 7122, and H.R. 7985 (as introduced), 86th Cong., 1st Sess. (1959).

**/ S. Rep. No. 562, supra at 11.

***/ Section 315(a)(4). Congress recognized that broadcasters could exercise little control over format of political conventions. As the House Report stated: " . . . [I]n the case of political conventions the respective political parties largely control whether, in what capacity, and to what extent a particular political candidate shall participate in the convention . . . ." See H.R. Rep. No. 802, 86th Cong., 1st Sess. 7 (1959) ("H.R. Rep. No. 802").

Moreover, speeches by an incumbent President reporting on matters of great national importance are exempt. See, e.g., Republican Nat'l Comm., 40 F.C.C.408 (1964), aff'd by an equally divided court (D.C. Cir. unrep'd). And the legislative history reflects an understanding that the Section 315(a)(4) exemption would apply to an announcement of candidacy. See 105 Cong. Rec. 14441, 14450 (1959) (remarks of Senator Engle). Such speeches or announcements obviously are subject to the candidate's "control."

B. SWP's Arguments Based on Post-Enactment "Legislative History" Are Unpersuasive.

SWP argues that various acts and omissions by Congress after the enactment of the 1959 amendments either evidence legislative recognition that debates were not exempt or have given the Commission's decisions in Wyckoff and Goodwill the force of statutory law as a result of Congressional acquiescence. As the District of Columbia Circuit recognized in Chisholm, this argument is without merit. Slip op. at 23-32.

SWP first argues that the 1960 suspension of the "equal opportunities" requirement showed a legislative recognition that debates were not exempt under the 1959 amendments.*/ But the 1960 suspension, as the District of Columbia Circuit pointed out, was neither limited to, nor intended to be limited to, debates; it freed broadcasters to present many types of appearances by candidates that are not encompassed by the Commission's Aspen ruling.**/

Nor is Congress' failure to overturn the Commission's 1962 Goodwill and Wyckoff decisions of persuasive weight. The Supreme Court has on a number of recent occasions warned of the difficulties of attaching great significance to congressional inaction. See Barrett v. United

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*/ SWP brief at 45-48.

**/ See generally S. Rep. No. 1539, 86th Cong., 2d Sess. (1960); Chisholm v. FCC, supra, Slip op. at 24-25.

States, 423 U.S. 212, 223 n. 8 (1976); Zuber v. Allen, 396 U.S. 168, 185-86 n. 21 (1969). As the court in Chisholm observed, Congress has done "nothing that can be interpreted as active approval of the Commission's 1962 interpretation." To the contrary,

> ". . . Congressional inaction in this instance is entirely consistent with the interpretation that Congress was willing to leave to the Commission the interpretation of the exemptions as they applied to specific program formats. In this sense, Congressional acquiescence in the Commission's [earlier] interpretation does not indicate that it was the only, or the best, interpretations." Slip op. at 27-28.

Indeed, under a logical extension of petitioner's argument, it could as well be maintained that, since the Aspen ruling was issued more than twelve months ago, Congress' failure to act represents a Congressional judgment that candidate debates should be exempted from Section 315. */

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*/ In its brief in this Court SWP seeks the right to participate in the 1976 presidential and vice-presidential debates. SWP brief at 53-54. SWP made no such request for extraordinary relief from the FCC, and it is accordingly barred from seeking it here. See 47 U.S.C. § 405. Even if SWP had properly raised the argument and even if SWP were entitled to "equal opportunities," SWP could not conceivably be entitled to an order requiring that its candidates be permitted to participate in future debates. Section 315 has consistently been construed by the FCC as affording political candidates only the right to later broadcast time if the rule of equal opportunities is violated. For example, in Socialist Workers 1970 New York State Campaign Committee, 26 F.C.C.2d 38 (1970), SWP itself claimed that exclusion of its candidate from a debate involving three other candidates for the United States Senate and to be broadcast on radio was a denial of equal opportunities. The radio station had offered SWP's candidate, and the

[footnote continued]

II. The Construction of § 315 Urged by SWP Would Raise Serious First Amendment Questions.

SWP notably fails to address the First Amendment implications of the arguments it advances. There should be no misconception about the effect of the construction of Section 315 for which it contends: If broadcast licensees who choose in the future to cover news events like the Ford-Carter debates are subject to equal opportunities requirements, the result will not be broadcast exposure for the candidates of SWP and the dozens of other minor parties or the dozens of other candidates who are not sponsored by an organized political party. Rather, because of the enormous equal opportunities obligations involved, broadcasters will be compelled to forego coverage of such news events. As we noted above, there are some 89 minor candidates for

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[footnote continued from previous page]

other candidates, each a separate half-hour of free time immediately following the debate. The FCC rejected SWP's argument, relying on a previous FCC ruling

> ". . . in circumstances similar to those herein, that a licensee 'fulfilled the requirements of the "equal opportunities" provision when it offered all candidates equal amounts of time free of charge in comparable time periods.' (Public Notice of August 7, 1970, 'Use of Broadcast Facilities by Candidates for Public Office,' 35 F.R. 13048, 13062, Q & A VI. B. 11.)." 26 F.C.C.2d at 38.

See also Conservative Party, 40 F.C.C. 1086 ('962); FCC Primer, 35 Fed. Reg. 13050, 13060-63 (1970). SWP cites no statutory language, legislative history, FCC decision or judicial authority which would support its right to participate in the debates.

President listed by the Federal Election Commission, and at least three minor candidates in addition to those of SWP have demanded to be included in the 1976 debates or to be given equal opportunities. Should this Court now reach a result different from that in Chisholm, it can confidently be predicted that many more candidates will demand equal opportunities. Thus any broadcaster who chose to broadcast a one and one-half hour debate between President Ford and Mr. Carter could incur the obligation to afford dozens of prime time hours to satisfy the resulting "equal time" obligations. It would be understandable if broadcasters were to determine, in the exercise of their journalistic judgment, that this would not serve the interests of an informed public.

Congress recognized this problem in 1959 when it voted to exempt bona fide news programs from equal opportunities requirements. As the Senate Report noted:

> "The inevitable consequence [of applying the equal opportunities concept to news] is that a broadcaster will be reluctant to show one political candidate in any news-type program less he assumes the burden of presenting a parade of aspirants." S. Rep. No. 562, 86th Cong., 1st Sess. 9 (1959), quoted in Chisholm, Slip op. at 6 n.5.

Since the enactment of the 1959 amendments, the decisions of the Supreme Court and lower courts have increasingly recognized the chilling effect of "reply" requirements

such as that contained in the equal opportunities provision and the serious First Amendment issues posed by such requirements.

In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Supreme Court held that the Commission's personal attack and political editorializing rules did not violate the First Amendment, and indicated that the fairness doctrine generally was constitutional. But the Court made clear that questions as to the application of those rules and the fairness doctrine in the future were still open, and stated:

> "[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." 395 U.S. at 393.

Since Red Lion, various decisions -- mindful of the danger of inhibiting broadcast journalism -- have repeatedly interpreted the doctrine to avoid interference with the journalistic discretion of broadcasters. E.g., Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1008 (D.C. Cir. 1976); National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101, 1110-13 (D.C. Cir. 1974), vacated on discretionary grounds, id. (1975), cert. denied, 424 U.S. 910 (1975). Cf. Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 297 (D.C. Cir. 1975).

In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), the Court, in rejecting the claim that the First Amendment created an individual right of access to broadcast facilities, emphasized both the

crucial role of broadcasters as journalists and the danger of government intrusion into that role. The Court stated not only that Congress intended in the Communications Act "to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations" (412 U.S. at 110), but also that a system based on licensee discretion furthered the policies of the First Amendment and the "ideal of vigorous, challenging debate on issues of public interest." 412 U.S. at 121.

The Court in CBS focused on the central First Amendment principle that risks of abuse by the press are outweighed by the need for a free and vigorous press:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors -- newspaper or broadcast -- can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility -- and civility -- on the part of those who exercise the guaranteed freedoms of expression." 412 U.S. at 124-25.

Most recently, the Supreme Court has emphasized that statutes designed to augment the public's exposure to different ideas may have precisely the opposite effect. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the

Court held that a Florida statute granting a political candidate a right to equal space to reply to criticism by a newspaper violated the First Amendment for this very reason:

> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' New York Times Co. v. Sullivan, supra, 376 U.S. at 279 . . . ." 418 U.S. at 257. (Footnote omitted.)

We submit that the chilling effect on the exercise of freedom of the press that would result from reversal of the Commission's ruling and application of the equal opportunities requirements of Section 315 to candidate debates would be extremely serious. And there would be a corollary interference with the public's "right to know."

Clearly, neither Congress nor the Commission could forbid either broadcast or print journalists from covering or reporting news events. An interpretation of Section 315 in a way that surely deters broadcast coverage of news events would have only a slightly less severe impact on First Amendment rights than a direct ban. In Aspen the Commission

noted that its reinterpretation of Section 315 promoted the First Amendment values of a free press and an informed public. The courts have not yet had to face directly the question of the constitutionality of Section 315. We submit that it is particularly appropriate to avoid that question here by interpreting Section 315(a)(4) to give full effect to the remedial purpose of the 1959 amendments -- the facilitation of news coverage of political campaigns in the interest of an informed electorate. */

CONCLUSION

For the foregoing reasons, the Order under review should be affirmed.

Respectfully submitted,

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September 27, 1976

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*/ See 105 Cong. Rec. 17831 (1959) (remarks of Senator Scott); 105 Cong. Rec. 16236 (1959) (Rep. MacDonald); 105 Cong. Rec. 8746 (1959) (Sen. Case); 105 Cong. Rec. 5405 (1959) (Sen. Allott).

Many come, but few are chosen. The names listed below are those that were on file at the Federal Election Commission last week as candidates for the Presidency of the U.S. Some were never active. Some have dropped out since the primaries were held. Some, like Eugene McCarthy (independent), are still running.

The FCC defines a candidate worthy of consideration under Section 315 to be one who is actively seeking support and in a position to be voted for, whether appearing on a ballot or by write-in. How many of those on this list would qualify by FCC standards can only be surmised; broadcasters may find out as the campaign progresses.

The candidates are listed in alphabetical order. In some cases the home town is that of the organization that registered the candidate's name with the FEC.

Democrats [illegible]

Republicans [illegible]

Other [illegible] Independent Party; Eugene McCarthy, Washington, independent [illegible] James A. [illegible] Mobley, McKenzie, Tenn., independent; Conrad [illegible] Morrow, Dayton, Ohio, Symbiotic Union [illegible] Ray [illegible]

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 1976 I have caused the foregoing BRIEF FOR INTERVENOR CBS INC. to be served by hand on the persons listed below:

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